



Kentucky Law Journal

Volume 36 | Issue 3


Article 3

1948

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Recommended Citation

Mendelson, Wallace (1948) "John Marshall's Short Way With Statutes: A Study in the Judicial Use of Legislation to Expound the Constitution," *Kentucky Law Journal*: Vol. 36 : Iss. 3 , Article 3.
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JOHN MARSHALL'S SHORT WAY WITH STATUTES

A Study in the Judicial Use of Legislation
to Expound the Constitution

BY WALLACE MENDELSON*

Learned Hand, one of our wisest judges, observed that the words of a statute are "empty vessels into which (a judge) can pour nearly anything he will." And Felix Frankfurter has pointed out that "The (Supreme) Court's ingenuity in using legislation as an aid either in curbing or expanding constitutional powers is a great unwritten chapter in our constitutional history."¹ That chapter, like so many others, finds a beginning with Chief Justice Marshall—and nowhere does the cat of Marshall's preconceptions more freely escape the bag than in the "esoteric" constructions which he put upon both state and national legislative measures. As though constantly conscious that the days of the Federalists upon the bench were limited, he could not wait upon the facts, but must with "painful ingenuity" work the material at hand against the evil day when the agrarians would control the judiciary. If judges who are ambitious to mold the law have little choice in the cases and facts presented for adjudication, Marshall's efforts at least are a monument to the proposition that in the interpretation of statutes there is scope for judicial discretion and the vindication of personal preconceptions.

Section 13 of the Judiciary Act of 1789 authorized the Supreme Court to issue "writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."² The act had been drafted by Oliver Ellsworth, Marshall's predecessor on the bench, who had earlier served as a member of the Constitutional Convention. It had been enacted by a Congress several of whose members had attended the Constitutional Convention including some of the leading lawyers and

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¹ FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937) 20.

² STATUTES AT LARGE, I, Ch. 20, Sec. 13.

legal scholars of the day—William Paterson, George Wythe, Gouverneur Morris, Robert Morris, William Johnson, William Few, George Read, Richard Bassett, Caleb Strong, James Madison, Abraham Baldwin, Roger Sherman and Oliver Ellsworth. George Washington, who signed the measure as President, had been the convention's presiding officer. Apparently all understood and intended that Section 13 of the Judiciary Act of 1789 merely authorized the Supreme Court to issue writs of mandamus to federal officials in cases wherein it properly had jurisdiction. Certainly "the plain meaning" of the language used will bear that construction at least as well as any other. To hold, as Marshall does in *Marbury v. Madison*,³ that it purported to add to the Supreme Court's original jurisdiction in the face of clear constitutional restrictions⁴ is certainly forcing the issue—and flaunting the canon that statutes are to be construed in harmony with the Constitution whenever that may be done without violence to the fair meaning of the legislature's language.⁵ Even Marshall's great admirer, Beveridge, recognized that "the great Chief Justice" wanted an early opportunity to assert the Federalist doctrine of Judicial Supremacy. Marshall by esoteric statutory construction set up a straw man and then proceeded to knock it over—not Congress, but the Supreme Court by strained interpretation made Section 13 of the Judiciary Act of 1789 unconstitutional!

In *McCulloch v. Maryland*⁶ Marshall ignored the obvious, discriminatory nature of the Maryland tax upon an instrumentality of the national government. Invalidation of a measure which the court pointedly treated as non-discriminating obvi-

³ 1 Cranch 137 (1803). The Supreme Court had recognized the validity of Section 13 in five cases prior to *Marbury v. Madison*, BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919), Vol. III, pp. 129-30.

⁴ "In all cases affecting ambassadors, or other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make." Art. III, Sec. 2, par. 2.

⁵ This canon, to be sure, was not formulated as such until later, but the principle was well known. Thus in *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) Marshall says that an act of Congress ought not to be construed to violate international law "if any other possible construction remains."

⁶ 4 Wheat., 316 (1819).

ously carried constitutional implications enormously broader than facts at issue required. To exempt federal instrumentalities from bearing any of the cost of state government is quite different from a holding that they may not constitutionally be subjected to discriminatory local impositions. The huge "web of unreality" based upon Marshall's treatment of the Maryland legislation in the *McCulloch* case was brushed away only in our own day.⁷

In the same manner the state tax upon importers which was at issue in *Brown v. Maryland* is treated as non-discriminatory. In fact it discriminated against foreign commerce and so required at most a simple application of the constitutional prohibition upon state imposts or duties.⁸ Marshall insisted upon considering its validity under the commerce clause as well, where ignoring its discriminating character had broad constitutional implications. It is one thing to say that states may not put interstate commerce at a relative disadvantage with respect to other commerce, quite another that interstate commerce may not be made to pay its own way equally with other commerce. It took three decisions by Marshall's successors to clarify the problem.⁹

To find another base for the same result Marshall gave exotic meaning to national tariff legislation by construing it not simply as a revenue or protective measure, but also as the grant of a right or license to importers to sell in "the original package" before which state taxing power must give way. Taken together and at full face value *McCulloch v. Maryland* and *Brown v. Maryland* seriously dwarfed the constitutional scope of state taxing power in a manner that fit perfectly the Federalist theories of centralized government.

Again in *Gibbons v. Odgen*¹⁰ both state and national legislation receive glosses that afford opportunity for giving *ex cathedra* expression to Federalist dogma. To stimulate the development of steamboat navigation New York had by statute

⁷ *Graves v. N.Y. ex rel O'Keefe*, 306 U.S. 466 (1939).

⁸ Art. I, sec. 10.

⁹ *Woodruff v. Parham*, 8 Wall, 123 (1869); *Welton v. Missouri*, 91 U.S. 275 (1876); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

¹⁰ 9 Wheat., 1 (1824).

granted exclusive steam navigation privileges upon New York waters to Robert Fulton and his partner. In the lower court Chancellor Kent, whose competence as a judge may not be lightly dismissed, had found no conflict between the New York grant and federal authority. But when the validity of the state measure was challenged in the Supreme Court Marshall without a word of discussion treated the grant as covering interstate as well as local commercial navigation. His successor, Chief Justice Taney, doubtless would have done otherwise by a simple application of the doctrine of strict construction against the grantee and in favor of the state.¹¹

Having without any question accepted the broadest possible interpretation of the state legislation, Marshall then proceeded to stretch the meaning of the National Coasting License Act¹² to distorted proportions so that he might find a conflict between the two and accordingly invalidate the local legislation under the constitutional principle of national supremacy. Thus a national coasting license is interpolated as the grant of the right of free transit over navigable water before which state self-government must be subsumed. But later when it suited his purposes in another case—or was it because he could no longer carry his associates into the realms of unreality—Marshall entirely ignored this elongated interpretation of the same National Coasting License Act and by a play on words reached an opposite result.¹³ In the face of a national coasting license a state might not interfere with national commerce by granting exclusive steam navigation privileges, but it might do so by authorizing a dam across navigable water to the exclusion of all commercial navigation!

¹¹ See the *Charles River Bridge Co. Case*, 11 Peters 420 (1837) where at page 547 Taney says "it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created." It is interesting that the real danger of these "exclusive" state grants grew out of Marshall's own earlier holdings in *Fletcher v. Peck* and the *Dartmouth College Case* (see below) which put them beyond the scope of subsequent legislative regulation.

¹² Act of Feb. 19, 1793, Ch. 8, I Stat. 305.

¹³ *Willson v. Blackbird Creek Marsh Company*, 2 Peters 245 (1829). In the *License Cases*, 5 Howard 504, 583 (1847) Taney chides Marshall for the word play, and construes the National Coasting License Act as granting to license holders merely "the right to navigate the public waters whenever they find them navigable."

Finally in *Fletcher v. Peck*,¹⁴ and the *Dartmouth College Case*¹⁵ Marshall treated state legislation as a form of contract in order to bring it within the constitutional prohibition upon the impairment of contract obligations.¹⁶ To hold that a state may contract away its governing power is indeed a strange conclusion—which can only be reached by the most tortuous means. In *Fletcher v. Peck* the first of the contract cases, Marshall observed that contracts are either executed or executory “A contract executed is one in which the object of the contract is performed, and this, says Blackstone, differs in nothing from a grant.” Ergo a state legislative grant of land (procured in a manner highly tainted with fraud) is a contract within the protection of the contract clause and so beyond the power of state revocation.

But citing Blackstone’s equation and playing upon his words cannot obscure the fact that by definition no obligation exists under either a grant or an executed contract—it having in each case been extinguished by performance. Hence the constitutional protection of contract obligations is not relevant. Painful statutory construction had again vindicated Federalist ideals—property interests must be safeguarded against majority rule. And again it remained for Marshall’s successors to whittle away large parts of his opinions.¹⁷

If one accepts as law merely what courts do, as distinct from what they say, Marshall’s holdings are at best unimpressive—the Supreme Court does not have original jurisdiction to adjudicate the claim of a disappointed office seeker against high government officials, states may not impose discriminatory

¹⁴ *Fletcher v. Peck*, 6 Cranch 87 (1810).

¹⁵ *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819).

¹⁶ Art. I, Sec. 10, par. 1. The due process clause of the 14th Amendment was not then available.

¹⁷ *Charles River Bridge Co. Case*, 11 Peters 420 (1837) *Munn v. Illinois*, 94 U.S. 113 (1877) and companion cases; *Stone v. Mississippi*, 110 U.S. 814 (1880), *Nebbia v. New York*, 291 U.S. 502 (1934). With Marshall’s verbalisms in *Fletcher v. Peck* compare the refreshing realism of Taney in the *Charles River Bridge Co. Case*: “While the rights of private property are sacredly guarded, we must not forget, that the community also has rights, and that the happiness and well-being of every citizen depends on their faithful preservation.” “it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created” i.e. that it has contracted away its power to govern.

burdens upon the operations of the national government, states may not levy imposts or duties upon imports from abroad, states may not grant exclusive interstate navigation privileges. In the contract cases the holdings are somewhat less than unimpressive—state power to protect public health, welfare, safety and morals must give way before vested interests—even those predicated in fraud!

If on the other hand law is what courts say as distinct from what they do—and if one is willing to overlook a judge's "painful ingenuity" in setting up straw men to be knocked down with vigorous, premise-obscuring rhetoric—then John Marshall did indeed erect an imposing body of constitutional law. Albeit his successors beginning with the first term of court following his death have been diligently whittling away at it until today little remains.

KENTUCKY LAW JOURNAL

Volume XXXVI

March, 1948

Number 3

Published in November, January, March and May by the College of Law, University of Kentucky, Lexington, Kentucky. Entered as second-class matter October 12, 1927, at the post office, at Lexington, Kentucky, under the act of March 3, 1879.

SUBSCRIPTION PRICE \$2.50 PER YEAR

\$1.00 PER NUMBER

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